Office - Supreme Court, U.S.
FILED
NOV 24 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 80-1208, 80-1471 and 80-1610.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NEW ENGLAND POWER COMPANY, *Appellant*,

v.

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, *et al.*, *Appellees*.

COMMONWEALTH OF MASSACHUSETTS, *et al.*, *Appellants*,

v.

NEW HAMPSHIRE LEGISLATIVE UTILITY CONSUMERS' COUNCIL, *Appellee*,

---

DENNIS J. ROBERTS II, *et al.*, *Appellants*,

v.

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, *et al.*, *Appellees*.

On Appeals From The Supreme Court Of The State Of New Hampshire

---

REPLY BRIEF OF APPELLANT NEW ENGLAND POWER COMPANY

EDWARD BERLIN,
J. PHILLIP JORDAN,
CARMEN D. LEGATO,
LEVA, HAWES, SYMINGTON, MARTIN & OPPENHEIMER
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

SAMUEL HUNTINGTON,
Counsel of Record
JOHN F. SHERMAN, III,
25 Research Drive,
Westborough, Massachusetts 01581
(617) 366-9011

Attorneys for Appellant New England Power Company

PARTIES TO THE PROCEEDING BELOW

Pursuant to Rules 28.1 and 34.1(b), Appellant, New England Power Company (NEP) incorporates its statement of "Parties to the Proceeding Below" contained in its Brief at ii (filed July 24, 1981). In addition to the affiliates of NEP there listed, New England Electric Transmission Corporation has recently become an affiliate of NEP.

TABLE OF CONTENTS

	Page
ARGUMENT	1
I. New Hampshire's Prohibition Is Simple Economic Protectionism that Is *Per Se* Invalid	1
A. A Proprietary Interest in a Natural Resource Does Not Entitle a State To Restrict Commerce in Products Manufactured from the Resource by Private Parties	2
B. New Hampshire Does Not Have a Proprietary Interest in the Flow of the River; the State's Interest Is No Greater Than Its Interest in Wild Animals	5
C. *Reeves, Inc.* v. *Stake* Is Not Relevant to This Case Because New Hampshire Has Not Invested in the Production of Hydroelectric Energy	8
II. Section 201(b) of the Federal Power Act Is Not an Affirmative Grant of Power to New Hampshire To Regulate Interstate Commerce	10
III. The PUC's Order Is Preempted by Part I of the Federal Power Act	12
IV. As Long as NEP's Hydroelectric Units Are Connected to the Interstate Grid, Any Wholesale Sales by NEP to New Hampshire Utilities Are Subject to FERC's Exclusive Ratemaking Authority	15
CONCLUSION	17

TABLE OF AUTHORITIES

CASES:	Page
Baldwin v. *Montana Fish and Game Commission*, 436 U.S. 371 (1978)	8
Cantor v. *Detroit Edison Co.*, 428 U.S. 579 (1976)	9
Carr v. *City of Altus*, 385 U.S. 35 *(mem.) aff'g.* 255 F. Supp. 828 (W.D. Tex. 1966)	5
First Iowa Hydro-Electric Cooperative v. *FPC*, 328 U.S. 152 (1946)	7
FPC v. *Florida Power & Light Co.*, 404 U.S. 453 (1972)	15
FPC v. *Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954)	5, 7
FPC v. *Southern California Edison Co. ("City of Colton")*, 376 U.S. 205 (1964)	15
Geer v. *Connecticut*, 161 U.S. 519 (1896)	2, 4
Hicklin v. *Orbeck*, 437 U.S. 518 (1978)	3
H. P. Hood & Sons v. *DuMond*, 336 U.S. 525 (1949)	9
Hudson County Water Co. v. *McCarter*, 209 U.S. 349 (1908)	4, 5
Hughes v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976)	9
Hughes v. *Oklahoma*, 441 U.S. 322 (1979)	4, 5, 8
Jackson v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974)	9
Kaiser Aetna v. *United States*, 444 U.S. 164 (1979)	7
Lancaster & Jefferson Electric Light Co. v. *Jones*, 75 N.H. 172, 71 A. 871 (1909)	6
McMillan v. *Noyes*, 75 N.H. 258, 72 A. 759 (1909)	2
Pennsylvania v. *West Virginia*, 262 U.S. 553 (1923)	3, 4
Public Utilities Commission v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927)	4, 11
Reeves, Inc. v. *Stake*, 447 U.S. 429 (1980)	8, 9, 10
St. Regis Paper Co. v. *New Hampshire Water Resources Board*, 92 N.H. 164, 26 A.2d 832 (1942)	6, 7
South-Central Timber Development, Inc. v. *LeResche*, 511 F. Supp. 139 (D. Alaska 1981), *appeal docketed*, No. 81-3053 (9th Cir. Jan. 15, 1981)	3
Swain v. *Pemigewasset Power Co.*, 76 N.H. 498, 85 A. 288 (1912)	6

Table of Authorities Continued

Page

Tacoma v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958) ... 7

Toomer v. *Witsell*, 334 U.S. 385 (1948) 7

United States v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950) 7

United States v. *Public Utilities Commission of California*, 345 U.S. 295 (1953) 10

United States v. *Twin City Power Co.*, 350 U.S. 222 (1956) 5

Utah Power & Light Co. v. *Pfost*, 286 U.S. 165 (1932) ... 2

Washington Dept. of Game v. *FPC*, 207 F.2d 391, (9th Cir. 1953), *cert. denied*, 347 U.S. 936 (1954) 7

West v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911) ... 4, 8

CONSTITUTIONAL AND STATUTORY PROVISIONS:

United States Constitution

Commerce Clause, art. I, § 8, cl. 3 ..... 2, 3, 4, 8, 9, 10, 12

Supremacy Clause, art. VI, cl. 2 7

Federal Power Act

Section 7(a), 16 U.S.C. § 800(a) (1976) 14

Section 10(a), 16 U.S.C. § 803(a) (1976) ... 12, 13, 14, 15

Section 20, 16 U.S.C. § 813 (1976) 11

Section 23(b), 16 U.S.C. § 817 (1976) 15

Section 201(b), 16 U.S.C. § 824(b) (Supp. III 1979) ... 10, 11, 12, 16

Federal Water Power Act, ch. 285, Section 10(a), 41 Stat. 1068 (1920) 13

Public Utility Act of 1935, ch. 687, Section 212, 49 Stat. 847 (1935) 13

MICELLANEOUS:

79 Cong. Rec. 10527 (1935) 10

H.R. Rep. No. 1318, 74th Cong., 1st Sess. (1935) 14

Public Utility Holding Company Act of 1935: Hearings on S. 1725, Before the Senate Comm. on Interstate and Foreign Commerce, 74th Cong., 1st Sess. (1935) 14, 15

Table of Authorities Continued

	Page
S. Rep. No. 621, 74th Cong., 1st Sess. (1935)	14
R. Pound, *An Introduction to the Philosophy of Law* (Yale paperbound ed. 1954)	7
Weil, *Running Water*, 22 Harv. L. Rev. 190 (1909)	7, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

Nos. 80-1208, 80-1471 and 80-1610.

NEW ENGLAND POWER COMPANY, *Appellant*,

v.

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, *et al.*, *Appellees*.

COMMONWEALTH OF MASSACHUSETTS, *et al.*, *Appellants*,

v.

NEW HAMPSHIRE LEGISLATIVE UTILITY CONSUMERS' COUNCIL, *Appellee*,

---

DENNIS J. ROBERTS II, *et al.*, *Appellants*,

v.

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, *et al.*, *Appellees*.

On Appeals From The Supreme Court Of The State Of New Hampshire

---

REPLY BRIEF OF APPELLANT NEW ENGLAND POWER COMPANY

ARGUMENT

I. New Hampshire's Prohibition Is Simple Economic Protectionism that Is *Per Se* Invalid

Our initial brief demonstrated that New Hampshire's effort to confine the economic benefits of New England Power Company's

(NEP's) hydroelectric power to New Hampshire residents falls squarely within the Court's decisions holding such economic protectionism to be virtually *per se* unlawful. New Hampshire has attempted to distinguish those decisions by arguing that it has a proprietary interest in the flow of the Connecticut River that entitles it to restrict commerce in the hydroelectric power generated from the flow.

New Hampshire's contention that it possesses a proprietary interest in the flow of the Connecticut River is based largely on a case which has been overruled. *Geer* v. *Connecticut*, 161 U.S. 519 (1896), *overruled by Hughes* v. *Oklahoma*, 441 U.S. 322 (1979). The contention should be rejected. The Court need not reach the issue of proprietary interest, however, because the basic assumption underlying New Hampshire's argument — that a state's ownership of a natural resource would permit it to restrict commerce in products manufactured from that resource by private interests — is wrong. We address this question first.

A. *A Proprietary Interest in a Natural Resource Does Not Entitle a State To Restrict Commerce in Products Manufactured from the Resource by Private Parties*

New Hampshire does not, and could not, deny that the hydroelectric power it seeks to restrain is a product of NEP's investment and manufacture. Nor does it deny that electric power is a product separate and distinct from the flow of a river.[1] New Hampshire does assert, however, without citing any authority, that its "prior rights in the potential energy in the flow of the river" entitle it to restrict commerce in the manufactured commodity. Brief of Appellees at 8-9; *see also id.* at 7.

---

[1] Such an argument would be foreclosed in any event by *Utah Power & Light Co.* v. *Pfost*, 286 U.S. 165 (1932), in which the Court held that, for purposes of the Commerce Clause, there is a distinction between the mechanical energy of falling water and the electric energy produced from it. The Court noted that hydroelectric generation "converts the mechanical energy of falling water into electrical energy" and "by the application of human skill, a distinct product is brought into being," *id.* at 179, much like, for example, "the conversion of wheat into flour at the mill." *Id.* at 180. *Cf. McMillan* v. *Noyes*, 75 N.H. 258, 264-65, 72 A. 759, 762 (1909)(recognition of hydroelectric energy as a "product" whose manufacture was intended to be encouraged by a certain New Hampshire statute).

The decision in *Hicklin* v. *Orbeck*, 437 U.S. 518 (1978), refutes New Hampshire's assertion. There the Court held that Alaska's ownership of certain oil and gas resources did not entitle it to require that private parties exploiting the resources favor Alaska residents for employment. The Court ruled that, whatever restrictions a proprietary interest might enable a state to place on resources, Alaska's restrictions on employment had gone too far. *Id.* at 531. The same may be said for New Hampshire's assertion: whatever restrictions a proprietary interest might enable the state to place on a resource like river flow, attempting to restrict commerce in products privately produced from it goes too far.

We submit that the result in *Hicklin* would have been no different had Alaska restricted commerce in fertilizer, petrochemicals or, for that matter, electric energy manufactured or generated by private parties from state-owned gas and oil. The restrictions which *Hicklin* held went too far principally affected employment related to extraction and transmission; the New Hampshire statute goes even further. Unlike New Hampshire's statute, the "Alaska hire" law did not go so far as to restrict commerce in the products manufactured from the state-owned resource, did not restrict the resource from being exported, and had no application once the resource was exported. In contrast, New Hampshire's law does not even regulate the resource that it assertedly owns (the river's flow), but seeks to restrict only a product manufactured from that resource. Thus, New Hampshire's position must rest on the argument that a state may regulate any product derived from state-owned resources without any limitation by the Commerce Clause.

To accept New Hampshire's argument would remove from the protection of the Commerce Clause innumerable products produced by private parties, seriously undermining the concept that "in the matter of interstate commerce we are a single nation." *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 596 (1923). For example, the argument would authorize an export ban on all articles — such as furniture and newsprint — manufactured from timber grown on state land, or on all articles manufactured from aluminum that is produced from bauxite found under state land. [2] The infinitely expansive nature

---

[2] *Cf. South-Central Timber Development, Inc.* v. *LeResche*, 511 F. Supp. 139, 142-43 (D. Alaska 1981), *appeal docketed*, No. 81-3053 (9th Cir. Jan.

of New Hampshire's argument is also apparent in the context of this case. A great river like the Connecticut can contribute to the production of much more than electric energy. Should New Hampshire be permitted to prohibit the export of crops that were irrigated, or flour that was milled using the river's flow? Merely to state the question is to answer it.

The point is that even if New Hampshire had a proprietary interest in the river's flow that exempted its actions with respect to that flow from Commerce Clause constraints (which, as we show in Part I.B. *infra*, it does not), it could not bootstrap that interest into a right to restrain commerce in products, such as electric power, into which the river's flow is converted by private investment and enterprise. The electric power manufactured by NEP is a product which NEP owns precisely as the companies owned the natural gas extracted from the ground in *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911), and *Pennsylvania* v. *West Virginia*. New Hampshire's prohibition against the exportation of hydroelectric power is no different, analytically, than a state's prohibition against exporting natural gas that it has allowed to become privately owned. The starting point for analysis here, therefore, is not the state's interest in rivers, but this Court's holding in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), that "[t]he transmission of electric current from one State to another, like that of gas, is interstate commerce." *Id.* at 86.

Because New Hampshire has sought to restrict privately-produced hydroelectric energy and not use of river water itself, its reliance on *Hudson County Water Co.* v. *McCarter*, 209 U.S. 349 (1908), is misplaced. Whatever the vitality of that decision, it is irrelevant to this case.[3]

15, 1981), in which a court held that Alaska's policy of requiring "primary manufacture" of timber in-state as a condition to the sale of state-owned timber violates the Commerce Clause.

[3] The decision in *Hudson County Water Co.*, upholding a state restriction on the diversion of fresh waters from a stream to an out-of-state buyer, rested largely upon *Geer* v. *Connecticut*, 161 U.S. 519 (1896), which, as noted, has been overruled by *Hughes* v. *Oklahoma*, 441 U.S. 322, 326 (1979). The author of the opinion in *Hudson County Water Co.* later dissented in both *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911), and *Pennsylvania* v.

B. *New Hampshire Does Not Have a Proprietary Interest in the Flow of the River; the State's Interest Is No Greater Than Its Interest in Wild Animals*

In Part I.A *supra*, we showed that a state's proprietary interest in a resource would not entitle it to restrict commerce in commodities produced from the resource by private enterprise. In this part we will show that New Hampshire does not even have the proprietary interest that it claims in the flow of the Connecticut River.

New Hampshire's argument, briefly stated, is that it has proprietary interests in the flow of the river that entitle it to condition NEP's use of the flow to generate power. Brief of Appellees at 8-9. As a part of that argument, New Hampshire notes that this Court has frequently rejected the concept of private ownership of a navigable river like the Connecticut. *Id.* at 7-8, *citing United States* v. *Twin City Power Co.*, 350 U.S. 222, 228 (1956), and other cases. From the absence of private ownership, New Hampshire apparently argues that ownership must reside in the state.

This Court's own explanation of the cases cited by New Hampshire shows the fallacy in the state's argument. In *FPC* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954), the Court explained that those cases established the "inconceivability of private *ownership in the running water* of navigable streams as distinguished from private proprietary *rights to the use of such water* for power and other purposes." *Id.* at 250 n.14 (emphasis in original). It is only the "proprietary rights to the use of such water for power" that are relevant to this case, because the hydroelectric power at issue is the product of the exercise of those rights and not of any claim to "ownership in the running water." New Hampshire's contention that NEP cannot own the river itself, and the cases cited by New Hampshire to support its contention, are therefore inapposite.

West Virginia, 262 U.S. 553 (1923), in the latter case citing *Hudson County Water Co.* in his dissent, 262 U.S. at 603; *see also Hughes* v. *Oklahoma*, 441 U.S. at 330 n.9. And this Court subsequently summarily affirmed a case reaching the opposite result from *Hudson County Water Co.* on similar facts. *Carr* v. *City of Altus*, 385 U.S. 35 *(mem.) aff'g* 255 F. Supp. 828 (W.D. Tex. 1966).

Under the common law as adopted in New Hampshire it is NEP, not the state, that owns the rights to use the water of the Connecticut River to generate power. The Supreme Court of New Hampshire has described those rights as follows:

> The rights of riparian owners at common law to a beneficial use of the water of the river or stream, passing through or adjacent to their lands, are not open to serious doubt. They are entitled to a reasonable usufruct of the water, or of the power it is capable of developing in consequence of the natural configuration of the bed of the stream opposite their respective lands. If at that place there is such a fall in the flow of the stream that it is capable of being utilized for the development of mechanical power by the erection of a dam and the usual appliances used in connection therewith, the riparian owner has a valuable interest in that natural condition of the stream, which is incident to his ownership of the land, extending ordinarily to the thread of the stream.

Swain v. *Pemigewasset Power Co.*, 76 N.H. 498, 499, 85 A. 288, 289 (1912). The right of a riparian owner like NEP to use the flow of a river to generate power has been recognized by the New Hampshire Supreme Court as a property right, and if that right is invaded by a private party the riparian owner may recover damages. *Lancaster & Jefferson Electric Co.* v. *Jones*, 75 N.H. 172, 181, 71 A. 871, 876 (1909); *see Swain* v. *Pemigewasset Power Co.*, *supra* at 499-502, 85 A. at 289-90.

Not only does NEP own the right to use the flow of the Connecticut River to generate power, the only proprietary right relevant to this case, but New Hampshire has no proprietary right at all in the Connecticut River. The Supreme Court of New Hampshire in this case referred to the river as "owned by the people of the State of New Hampshire" (J.S. App. 3a), and on other occasions that court has referred to the river as belonging to the state "in full and unrestricted title." *St. Regis Paper Co.* v. *New Hampshire Water Resources Board*, 92 N.H. 164, 169, 26 A.2d 832, 837 (1942). But the New Hampshire court has made clear that the "title" to the Connecticut River is held "in trust for the public." *Id.*[4] The crucial distinction

---

[4] Under New Hampshire law, riparian rights do not include rights against the state "in the exercise of its due control of the public waters." *St. Regis Paper Co.* v. *New Hampshire Water Resources Board*, 92 N.H. 164, 171,

between a proprietary interest and "title" as a trustee or guardian was explained by Dean Pound:

> [T]he so-called state ownership of *res communes* [e.g., rivers] and *res nullius* [e.g., wild animals] is only a sort of guardianship for social purposes. It is *imperium*, not *dominium*. The state as a corporation does not own a river as it owns the furniture in the state house. It does not own wild game as it owns the cash in the vaults of the treasury. What is meant is that conservation of important social resources requires regulation of the use of *res communes* to eliminate friction and prevent waste, and requires limitation of the times when, places where, and persons by whom *res nullius* may be acquired in order to prevent their extermination.

R. Pound, *An Introduction to the Philosophy of Law* 111 (Yale paperbound ed. 1954); *see FPC* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 246-47 & n.10 (1954); *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 744-45 (1950); *Toomer* v. *Witsell*, 334 U.S. 385, 402 (1948). [5]

---

26 A.2d 832, 838 (1942). In *St. Regis Paper Co.*, for example, the New Hampshire Supreme Court held that the riparian rights of a paper company were not infringed by a state-constructed dam that made no provision for the passage of the paper company's logs. Thus, New Hampshire's power of regulation of the flow of navigable rivers is similar to the power of the federal government to exercise its "navigable servitude" despite an adverse impact on riparian owners. *See generally Kaiser Aetna* v. *United States*, 444 U.S. 164, 175-77 (1979). But at most that power goes only so far as to permit regulation of the river's flow as, in *St. Regis*, by constructing a dam; it does not encompass regulation of the fruits of the riparian owner's use of the river's flow. New Hampshire has taken no action pursuant to whatever power it may possess to control the river's flow that is inconsistent or interferes with NEP's use of the river for power purposes. In any event, any attempt by New Hampshire directly to interfere with NEP's use of the river's flow needed to effectuate NEP's federal license is barred by the Supremacy Clause. *See Washington Dept. of Game* v. *FPC*, 207 F.2d 391, 396 (9th Cir. 1953), *cert. denied*, 347 U.S. 936 (1954), *construed in Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958); *First Iowa Hydro-Electric Cooperative* v. *FPC*, 328 U.S. 152 (1946).

[5] "Running water in a natural stream is not the subject of property, but is a wandering, changing thing without an owner, like the very fish swimming in it, or like wild animals, the air in the atmosphere, and the negative community in general." Weil, *Running Water*, 22 Harv. L. Rev. 190, 213 (1909).

As Dean Pound and the other authorities indicate, the whole ownership theory as applied to rivers and wild animals is simply a legal fiction denoting a state's power to preserve and regulate the exploitation of important natural resources. This "ownership" as a guardian or trustee does not alter traditional Commerce Clause analysis, since

> . . . the Court has recognized that the States' interest in regulating and controlling those things they claim to "own," including wildlife, is by no means absolute. States may not compel the confinement of the benefits of their resources, even their wildlife, to their own people whenever such a hoarding and confinement impedes interstate commerce.

Baldwin v. *Montana Fish and Game Commission*, 436 U.S. 371, 385-86 (1978).

In short, any regulation by New Hampshire of the use of the Connecticut River must be regarded no differently than state regulation of wild animals.[6] As the Court held in the term following *Baldwin*, state regulation of wild animals challenged under the Commerce Clause "should be considered according to the same general rule applied to state regulations of other natural resources." *Hughes* v. *Oklahoma*, 441 U.S. at 335. That "general rule" is the one derived from *West* v. *Kansas Natural Gas Company*, *see Hughes* v. *Oklahoma*, 441 U.S. at 329-30, and under that general rule, as discussed in our initial brief, New Hampshire's prohibition against exportation of the economic benefits of hydroelectric power is *per se* invalid.

C. Reeves, Inc. v. Stake *Is Not Relevant To This Case Because New Hampshire Has Not Invested In The Production Of Hydroelectric Energy*

New Hampshire attempts to analogize its prohibition against exportation of hydroelectric energy to South Dakota's policy of confining sales from a state-owned cement plant to local residents in times of shortage, which was upheld in *Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980). In fact, however, New Hampshire's prohibition is one of the

---

[6] The analogous legal treatment of rivers and wild animals has been described as "complete, from the days of the Roman law to our own time." Weil, *supra* note 5 at 206.

"state . . . regulatory measures impeding free private trade in the national marketplace" that the Court in *Reeves* noted have always been subject to scrutiny. 447 U.S. at 436-37, *citing Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 807-08 (1976).[7] Were New Hampshire to become a "market participant" by using state revenues to build its own generating plants, there might be some colorable argument under *Reeves* that it could restrict its sale of the electric energy generated at those plants to New Hampshire residents.[8] But New Hampshire has not done that. Instead, without making any investment, New Hampshire has simply exercised its regulatory authority to capture privately generated hydroelectric energy for the benefit of in-state residents.[9] That is precisely the kind of "home embargo" that cannot stand under the Commerce Clause. *See H. P. Hood & Sons* v. *DuMond*, 336 U.S. 525, 539 (1949), *quoted in Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. at 808.

New Hampshire makes an elaborate argument to the effect that because it *could* have built its own generating stations, and asserted-

---

[7] Appellees appear to argue that *Reeves'* exemption is applicable because a public utility like NEP is "closely identified with the sovereign." Brief for Appellees at 13-14. But it is established that the actions of an investor-owned public utility are not actions of the sovereign for purposes of constitutional analysis. *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 350-58 (1974). *Cf. Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976) (public utility not imbued with attributes of the sovereign so as to insulate provision contained in utility's tariff from antitrust laws under state-action exemption).

[8] Such a restriction would still be invalid because its practical effect would be "to hoard the benefits of natural resources [i.e., a river] which by happenstance are found" in New Hampshire. *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 444 (1980).

[9] Indeed, since hydroelectric power was exported for many years before New Hampshire cut off exports, out-of-state ratepayers actually paid off a substantial portion of the investment in NEP's hydroelectric generating stations, thereby reducing rate base and current rates. New Hampshire's belated effort to restrict exports is an attempt to capture for the exclusive benefit of New Hampshire ratepayers economic rents made possible in large part by revenues contributed by out-of-state consumers. (J.A. 12a).

ly, under *Reeves*, withhold the output of such stations from interstate commerce, it should be able to require NEP to withhold the output of NEP's plants. Brief of Appellees at 12-14. The difference between state investment in a manufacturing plant and state regulation of a privately owned manufacturing plant is crucial to *Reeves*, however. Obviously, to withdraw from Commerce Clause scrutiny any state regulation touching commerce in which a state theoretically could invest would destroy that Clause, since theoretically the states could invest in anything.

II. Section 201(b) of the Federal Power Act Is Not an Affirmative Grant of Power to New Hampshire To Regulate Interstate Commerce

New Hampshire concedes that judged solely by its language, Section 201(b) is not an affirmative grant. [10] (In fact, as we argued in our initial brief at 22, the language is inconsistent with an affirmative grant). Nevertheless, it argues that the legislative history of Section 201(b), consisting entirely of the remark made on the floor by Congressman Rogers, evinces a purpose to grant power to New Hampshire to regulate commerce. Brief of Appellees at 16-17, *quoting* 79 Cong. Rec. 10527 (1935). This argument, in turn, rests on either of two contradictory suppositions.

The first is that Congress *believed* that the states had power to restrict the export of hydroelectric energy. Though New Hampshire does not complete its argument, it may be completed as follows: since Congress believed that the states had the constitutional authority to restrict hydroelectric exports, it did not find it necessary to grant that authority to them; nevertheless, if the Court now finds that Congress' belief was incorrect, it should construe the language as a grant of authority to regulate commerce so that the presumed will of Congress would be fulfilled.

The answer to this argument is clear: this the Court will not do. *United States* v. *Public Utilities Commission of California*, 345 U.S.

[10] "Although this language is not that usually used by a legislature when authorizing an act, the history of the enactment of that section demonstrates that Congress intended to clothe New Hampshire with authority over the exportation of hydroelectric energy." Brief of Appellees at 15.

295, 302-304 (1953) (holding Section 20 of the Act, 16 U.S.C. § 813 (1976), which leaves certain wholesale rate regulation to the states, ineffective to permit such regulation in light of *Attleboro's* holding seven years later that such state regulation is void; Congress did not in Section 20 affirmatively grant the regulatory power to the states but simply assumed a breadth of state power that *Attleboro* showed was wrong).

The second supposition, which is diametrically opposed to the first, is that Congress *believed* that the states *lacked power* to impose export restrictions. Therefore, to avoid having Section 201(b) be a meaningless gesture, the Court, it is argued, should strain to find a basis for a grant of power to the states in language that New Hampshire concedes "is not that usually used by a legislature when authorizing an act." Brief of Appellees at 15. New Hampshire argues that it must be presumed that Congress did not intend the words "lawful authority now exercised" to refer to lawfulness; instead, those words mean the presence of state enabling legislation not yet stricken by any court. Under this curious construction, Section 201(b) would not be an affirmative grant of power to regulate commerce to State A, whose enabling legislation had been declared unconstitutional prior to passage of the Act, but that section would be an affirmative grant of power to regulate commerce to State B, whose identical legislation had not been judicially challenged as of the Act's passage.

Aside from New Hampshire's inability to find a persuasive construction of the language of Section 201(b) that is consistent with a grant of authority, its basic argument is circular. Its argument is that though the language does not appear to be a grant, the purpose to make a grant should persuade the Court to disregard the language. But New Hampshire points to nothing in the legislative history that demonstrates this purpose. Instead, it simply assumes that Congress intended for it to have power to regulate commerce and then attempts to make the language fit, not at all well, that assumption. As argued in our initial brief, however, the language of both Section 201(b) and Congressman Rogers' remarks on the floor is inconsistent with a purpose to grant power to the states. Section 201(b) is simply a traditional savings clause, saving from Part II preemption whatever "lawful authority" the states then had exercised over hydroelectric energy exports. See Brief of NEP at 22-29.

III. The PUC's Order Is Preempted by Part I of the Federal Power Act

In our initial brief, we demonstrated that the order of the New Hampshire Public Utilities Commission (PUC) is inconsistent with and preempted by Part I. We pointed out that the PUC's order frustrates the central purpose of Part I: to provide for the maximum development of hydroelectric power for the use and benefit of interstate commerce. By removing the economic benefits of hydroelectric power from interstate commerce, the PUC's order defeats the basic premise of the licenses under which NEP's hydroelectric units operate. [11]

New Hampshire acknowledges that the Act established exclusive federal licensing authority over hydroelectric development on the Connecticut River, but argues that Congress was indifferent to whether the power generated would benefit interstate commerce. Instead, New Hampshire argues that in exercising its power under the Commerce Clause, Congress' concern was limited to improving navigation for the benefit of interstate commerce; with respect to the other aspects of "comprehensive development" of the waterways as to which Congress articulated a federal interest, Congress had no intention to benefit interstate commerce. Brief of Appellees at 29.

New Hampshire's argument is founded entirely on a misreading of Section 10(a), 16 U.S.C. § 803(a) (1976), which provides in relevant part:

> All licenses under this subchapter [Part I] shall be on the following conditions:
>
> That the project adopted . . . shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan [1] for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, [2] for the improvement and utilization of water-power development, [3]

---

[11] We also showed how the PUC's order will inhibit future development of New Hampshire's hydroelectric potential, contrary to the purpose of Part I to promote hydroelectric development. Brief of NEP at 35-36. New Hampshire has not answered that argument. Nor does New Hampshire argue that Section 201(b) saves the PUC's order from preemption by Part I. See Brief of NEP at 36-37.

> and for other beneficial public uses, including recreational purposes. . . .

Pointing out that the quoted portion of Section 10(a) contains three clauses describing federal interests, and that only the first speaks of benefitting interstate commerce, New Hampshire argues that Congress intended only that improvement or development of waterways, and not development of power, benefit interstate commerce. In order to make this argument, New Hampshire ascribes to the words "improving or developing a waterway or waterways" the limited meaning of improving navigation, that is, improving the waterway for use as a highway. Brief of Appellees at 29.

New Hampshire's effort to confine the scope of federal interests that could benefit interstate commerce to development of a waterway "as a highway," *i.e.*, to aid navigation, ignores the obvious structure of Section 10(a) and is flatly inconsistent with the legislative history of that Section. The first clause, requiring that the improvement or development of the waterways benefit interstate commerce, obviously is an umbrella clause encompassing all federal interests in river development, while the two succeeding clauses merely illustrate the range of those interests. So understood, Section 10(a), as might be expected, reserves for the use and benefit of interstate commerce all of the fruits of federally licensed river development; Congress did not pick and choose among them as New Hampshire argues.

The legislative history of Section 10(a) confirms this reading. As enacted in 1920, Section 10(a) did not condition licensing on the improvement or development of waterways for the use or benefit of interstate commerce, and the first clause of the relevant sentence in Section 10(a) (quoted above) was concerned solely with improving navigation:

> That the project adopted . . . shall be such as in the judgment of the Commission will be best adapted to a comprehensive scheme of improvement and utilization *for the purposes of navigation*, of water-power development, and of other beneficial public uses.[12]

---

[12] Federal Water Power Act, ch. 285, § 10(a), 41 Stat. 1068 (1920) (emphasis added). The Federal Water Power Act (FWPA) was recodified, as amended, as Part I of the Federal Power Act, 16 U.S.C. § 792 *et. seq.* by Section 212 of the Public Utility Act of 1935, ch. 687, 49 Stat. 847 (1935).

The Federal Power Commission, charged with implementing the Act, apparently became concerned that the Act did not explicitly condition licensing on development of the waterways to benefit interstate commerce.[13] Responding to this concern, Congress in 1935 clarified its intention by changing the language of Section 10(a) to condition licensing on the improvement of a waterway for the use or benefit of interstate commerce. It did this by changing the first clause to the present "improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce."[14] This history thus makes clear Congress' purpose to benefit interstate commerce and the following statement in that history also makes clear that the term "development of the waterways" may not be equated with improvement of navigation, as New Hampshire argues:

> Section 206 of the bill amends section 10 of the Water Power Act in keeping with the changes made in the preceding amendment.[15] It provides that, as a condition of the issuance of a license, the project shall be such that in the judgment of the Commission, will be best adapted to a comprehensive scheme "for improving or developing a waterway or waterways for the

---

[13] *See* H.R. Rep. No. 1318, 74th Cong., 1st Sess., 7, 245 (1935); S. Rep. No. 621, 74th Cong., 1st Sess., 18, 45 (1935).

[14] Public Utility Holding Company Act of 1935: Hearings on S. 1725, Before the Senate Comm. on Interstate and Foreign Commerce, 74th Cong., 1st Sess. 228, 236 (1935) (hereinafter Hearings).

The above citations are to a comparison of the 1920 Act with the proposed amendments submitted by the FPC and a memorandum explaining the proposed amendments prepared by Mr. De Vane, the Solicitor of the Federal Power Commission who participated in drafting the legislation. The amendments to the FWPA proposed by the FPC were enacted without significant change. See authorities cited note 13, *supra*.

[15] The term "preceding amendment" referred to an amendment to Section 7(a), the municipal preference provision. The amendment to that section struck the word "navigation," to make clear that the Commission's discretion in awarding a preference was not narrowly confined but should encompass the full range of federal interests implicated by development of water resources. Hearings, note 14, *supra*, at 228, 236. Both the amendments to Sections 7(a) and 10(a), moreover, are consistent with the simultaneous

use or benefit of interstate or foreign commerce," *instead of the more limited "for the purposes of navigation."* It also adds to the other beneficial public uses to which the project may be adapted an express provision that the Commission may include consideration of recreational purposes. [16]

This history of the 1935 amendment to Section 10(a) squarely refutes New Hampshire's effort to limit the first clause of the current version to refer to improvements for purposes of navigation. It was precisely to make clear that all aspects of the improvement or development of the waterways by federally licensed projects was to benefit interstate commerce that Congress amended Section 10(a).

IV. As Long as NEP's Hydroelectric Units Are Connected to the Interstate Grid, Any Wholesale Sales by NEP to New Hampshire Utilities Are Subject to FERC's Exclusive Ratemaking Authority

We showed in our initial brief that the Federal Energy Regulatory Commission ("FERC") has exclusive ratemaking authority over all wholesale sales of electric energy in interstate commerce, including wholesale sales within New Hampshire. Since NEP's New Hampshire units would continue, under the PUC's order, to be interconnected to the New England regional power grid, wholesale sales within New Hampshire would necessarily include electric energy transmitted in interstate commerce and would be subject to FERC's exclusive jurisdiction. [17] *FPC* v. *Florida Power & Light Co.*, 404 U.S. 453 (1972); *FPC* v. *Southern California Edison Co. ("City of Colton")*, 376 U.S. 205 (1964). See Brief of NEP at 38-45.

---

expansion of the Commission's jurisdiction in Section 23(b) to impose mandatory and exclusive federal licensing requirements on all hydroelectric projects that would affect interstate commerce even if located on non-navigable waters. *Id.* at 231, 238.

[16] Hearings, note 14, *supra* at 236 (emphasis added).

[17] New Hampshire's first argument, Brief of Appellees at 30-31, that the PUC's order does not regulate wholesale rates in interstate commerce, is therefore frivolous. NEP's wholesale sales to customers both outside and within New Hampshire are exclusively regulated by FERC.

New Hampshire points out that *if* NEP's hydroelectric units and New Hampshire *were* electrically isolated from the rest of New England, then NEP's wholesale sales within New Hampshire would be wholly intrastate and subject to the PUC's ratemaking jurisdiction. New Hampshire goes on to argue that the imposition by the PUC of a lesser restriction on NEP should not defeat the PUC's jurisdiction. The Court is asked to infer state ratemaking authority from the Section 201(b) savings clause. Brief of Appellees at 30-32.

The short of the matter is that Section 201(b) does not explicitly or implicitly limit FERC's exclusive ratemaking authority over wholesale sales involving electric energy transmitted in interstate commerce. Section 201(b) preserves from Part II preemption only lawful state restrictions on the volume of hydroelectric energy exports; exclusive FERC wholesale ratemaking authority remains intact. The PUC's order invades FERC's exclusive domain and is therefore preempted by Part II of the Federal Power Act. See Brief of NEP at 45-48.

CONCLUSION.

The decision below should be reversed.

Respectfully submitted,

SAMUEL HUNTINGTON,
Counsel of Record
JOHN F. SHERMAN, III,
25 Research Drive,
Westborough, Massachusetts 01581
(617) 366-9011
EDWARD BERLIN,
J. PHILLIP JORDAN,
CARMEN D. LEGATO,
LEVA, HAWES, SYMINGTON,
MARTIN & OPPENHEIMER
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
Attorneys for Appellant New England Power Company

November 23, 1981